No. 2989 No. 14095

United States
Court of Appeals
for the Ninth Circuit.

SEABOARD FINANCE COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of Record

Petition to Review a Decision of the Tax Court of the United States.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—12-18-53

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

APPEARANCES

For Petitioner:

DANA LATHAM, ESQ.;

AUSTIN H. PECK, JR., ESQ.;

HENRY C. DIEHL, ESQ.

For Respondent:

R. E. MAIDEN, JR., ESQ.

The Tax Court of the United States

Docket No. 30554

SEABOARD FINANCE COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1950

Sept. 15—Petition received and filed. Taxpayer notified. Fee paid.

Sept. 18—Copy of petition served on General Counsel.

Sept. 15—Request for Circuit hearing in Los Angeles, Calif., filed by taxpayer. 10/4/50—Granted.

Nov. 13—Answer filed by respondent.

Nov. 17—Copy of answer served on taxpayer, Los Angeles, Calif.

1952

Feb. 20—Hearing set May 19, 1952, Los Angeles, Calif.

May 23—Hearing had before Judge Opper on merits, respondent's oral motion for leave of 20 days to file amendment to answer granted, petitioner allowed 5 days thereafter to file reply to amended answer.

Stipulation of facts with exhibits filed at hearing. Petitioner's brief, 7/22/52, respondent's 9/5/52, reply—9/22/52.

June 11—Amendment to answer filed by General Counsel. Copy served.

June 15—Transcript of Hearing 5/23/52 filed.

June 19—Motion for leave to file reply to amendment to answer, reply lodged, filed by taxpayer, granted.

June 20—Copies of motion and reply served on General Counsel.

July 21—Brief filed by taxpayer. Copy served.

Sept. 5—Motion to extend time to Oct. 3, 1952, to file brief filed by General Counsel. Granted 9/8/52.

Sept. 29—Motion to extend time to 11/3/52 to file reply brief, filed by taxpayer.

Oct. 3—Motion to extend time to 11/3/52 to file brief filed by General Counsel. 10/6/52—Granted.

Oct. 17—Motion for extension to Dec. 3, 1952, to file reply brief filed by taxpayer. 10/17/52 Granted.

Nov. 3—Motion for extension to Nov. 13, 1952, to file brief, filed by General Counsel. 11/4/52—Granted.

Nov. 13—Answer brief filed by General Counsel. 11/14/52—Copy served.

1953

Nov. 28—Reply brief filed by taxpayer. Copy served.

May 21—Findings of fact and opinion rendered. Judge Opper. Decision will be entered for the respondent. Copy served.

May 21—Decision entered. Judge Opper. Div. 14.

Aug. 21—Petition for review by U. S. Court of Appeals for the Ninth Circuit filed by taxpayer.

Aug. 21—Proof of Service filed.

Sept. 18—Designation of contents of record and statement of points filed by taxpayer, with attached affidavit of service by mail thereon.

Sept. 18—Notice of filing designation of contents of record and statement of points filed by taxpayer.

Sept. 22—Order extending time to 11/19/53 for filing the record and docketing the appeal, entered.

Sept. 24—Counter designation of contents of record filed by General Counsel, with statement of service by mail thereon.

[Title of Tax Court and Cause.]

PETITION

The above-named petitioner hereby petitions for a

redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (LA:IT:90D:LHP), dated June 28, 1950, and as a basis of this proceeding alleges as follows:

I.

Petitioner is a corporation organized and existing under the laws of the State of Delaware, with its principal office located at 945 South Flower Street, Los Angeles 15, California. Petitioner's income tax return for the period here involved was filed with the Collector of Internal Revenue for the Sixth District of California at Los Angeles, California.

II.

The notice of deficiency, a copy of which is attached hereto and marked Exhibit "A," was mailed to petitioner on June 28, 1950.

III.

The deficiency determined by respondent in said notice of deficiency is in federal income tax for the taxable year ended September 30, 1947, in the amount of $70,590.74.

The amount in controversy in this proceeding is approximately $70,590.74.

IV.

The determination of tax set forth in said notice of deficiency is based upon the following errors:

(1) Respondent erroneously disallowed as a deduction in computing petitioner's net income the amount of $77,298.06, or any other amount, repre-

senting amortization, for the period here involved, of the excess of cost of acquisition of certain assets, consisting in part of stocks of subsidiary companies, over the equity in such net assets at date of acquisition.

(2) Respondent erred in his determination that petitioner realized no gain from conversion of foreign exchange in the Dominion of Canada.

(3) Respondent erred in disallowing as a credit against petitioner's income tax a portion of the income taxes paid by petitioner to the Dominion of Canada and claimed by petitioner as a credit in computing its income tax liability to the United States for the period here involved.

(4) Respondent erred in his determination that the credit for income taxes paid by petitioner to the Dominion of Canada was $153,705.40, or any other amount less than the amount claimed as a credit by petitioner in its income tax return for the period here involved.

V.

The facts upon which petitioner relies as a basis for this proceeding are as follows:

(1) Petitioner is a corporation organized and existing under the laws of the State of Delaware, with its principal office at 945 South Flower Street, Los Angeles, California. Its federal income tax return for the period here involved was filed with the Collector of Internal Revenue for the Sixth District of California at Los Angeles, California.

(2) Prior to the period here involved, petitioner

acquired all, or substantially all, of the outstanding shares of stock of four other corporations, namely: Seaboard Finance Corporation, Par Associates, Inc., National Money Corporation, and Campbell Finance Corporation. The amounts paid by petitioner for said shares exceeded by substantial amounts the net value of the underlying assets of said corporations.

(3) Said four corporations were engaged in the small loan business, and each had outstanding loans receivable for which petitioner was willing to pay, and did pay, a premium. Petitioner desired to purchase said receivables in order to expand its business in amount and in areas in which it had not previously been active. Petitioner was unable to purchase said receivables direct, and could acquire them only through purchase of the shares of stock of said corporations in the manner and for the prices which it did in fact pay.

(4) Substantially all of the assets of said four corporations were loans receivable which had a limited life. Petitioner amortized the excess cost of the assets over a twelve-year period, as required by the Securities and Exchange Commission of the United States. Said loans receivable in fact have a useful life less than twelve years.

(5) On or about March 27, 1946, petitioner purchased 2,200,000 Canadian dollars at Toronto, Ontario, at a cost in United States dollars, at the then existing rate of exchange, of $2,000,000. Said Canadian dollars were held in Canada until on or about December 12, 1946, at which time they were ap-

plied, at petitioner's direction, on the purchase price in Canada of 50,000 shares of stock of Campbell Finance Corporation, a Canadian corporation engaged in the small loan business in Canada. At the time of said application, the value of the Canadian dollar in relation to the United States dollar had increased over its value on March 27, 1946.

(6) By reason of the application of said Canadian dollars as above described, petitioner realized a gain on conversion of foreign exchange in the amount of $189,000, which gain occurred in Canada. Petitioner reported said gain in its income tax return for the period here involved, and took it into account in computing the credit to which it was entitled on account of income taxes paid to the Dominion of Canada.

(7) Respondent eliminated said conversion gain from petitioner's income, thereby reducing the ratio of petitioner's net income from sources outside the United States, to wit: Canada, and correspondingly reduced the credit for income taxes paid by petitioner to the Dominion of Canada.

Wherefore, petitioner prays that this court hear this proceeding and determine that respondent erred in the particulars set forth in paragraph IV above.

Respectfully submitted,

/s/ DANA LATHAM,

/s/ AUSTIN H. PECK, JR.,

/s/ HENRY C. DIEHL,

Counsel for Petitioner.

State of California,
County of Los Angeles—ss.

A. E. Weidman, being first duly sworn, deposes and says: That he is the Secretary of Seaboard Finance Company of California, the petitioner in the foregoing Petition; that he is duly authorized to verify the foregoing Petition; that he has read the foregoing Petition and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon information and/or belief, and as to those matters, that he believes it to be true.

/s/ A. E. WEIDMAN.

Subscribed and sworn to before me this 7th day of Sept., 1950.

[Seal] /s/ ETHA M. DAVISSON,
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires Feb. 11, 1952.

EXHIBIT A

Treasury Department
Internal Revenue Service
417 South Hill Street
Los Angeles 13, California

Office of
Internal Revenue
Agent in Charge
Los Angeles Division

LA:IT.90D:LHP

June 28, 1950.

Seaboard Finance Company,
945 South Flower Street,
Los Angeles 15, California.

Gentlemen:

You are advised that the determination of your income tax liability for the taxable year ended September 30, 1947, discloses a deficiency of $70,590.74, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington 25, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA:Conf. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

GEO. J. SCHOENEMAN,
Commissioner.

By /s/ GEORGE D. MARTIN,
Internal Revenue Agent in
Charge

LHP:vmc
Enclosures:
Statement
Form of Waiver

STATEMENT

LA:IT:90D:LHP

Seaboard Finance Company
945 South Flower Street
Los Angeles 15, California

Tax Liability for the Taxable Year
Ended September 30, 1947

	Liability	Assessed	Deficiency
Income tax	$731,660.69	$661,069.95	$70,590.74

In making this determination of your income tax liability careful consideration has been given to the reports of examination dated June 13, 1949, and March 13, 1950, to your protests dated November 26, 1949, and April 17, 1950, and to the statements made at the conferences held.

It has been determined that the correct amount of the credit allowable for taxes paid to a foreign country is $153,705.40, in lieu of $230,580.91, the amount claimed in your return.

A copy of this letter and statement has been mailed to your representative, Mr. Dana Latham, 1112 Title Guarantee Building, 411 West Fifth Street, Los Angeles 13, California, in accordance with the authorization contained in the power of attorney executed by you.

Adjustments to Net Income

Net income as disclosed by return		$ 2,544,962.26
Unallowable deductions:		
(a) Franchise tax decreased	$ 36,607.11	
(b) Amortization disallowed	77,298.06	113,905.17
Total		$ 2,658,867.43
Nontaxable income:		
(c) Long-term capital gain decreased		198,274.93
Net income adjusted		$ 2,460,592.50

Explanation of Adjustments

(a) It has been determined that the correct deduction for California franchise tax is the amount of $50,809.05, in lieu of the amount, $87,416.16, claimed in your return, or a decrease of $36,607.11.

(b) The deduction of $77,298.06 claimed in your return for "Amortization of excess of cost of acquisition of capital stocks of subsidiary companies over equity in net assets thereof as shown by books of subsidiaries at dates of acquisition" is disallowed as not constituting a proper deduction under any section of the Internal Revenue Code.

(c) It has been determined that a long-term capital gain of $416,475.08 was realized from the sale or exchange of capital assets during this taxable year, in lieu of $614,750.01, the amount reported in your return, or a decrease of $198,274.93, which amount is computed as follows:

(1) Conversion gain on deposit eliminated from income	$189,000.00
(2) Gain from sale of stock decreased	9,274.93
Total decrease	$198,274.93

Explanation

(1) In your return you report a long-term capital gain of $189,000.00 designated as "Conversion gain on $2,000,000.00 deposit." It has been determined that no taxable gain resulted in connection with this transaction and the gain reported therefrom is eliminated from your income.

(2) It has been determined that a long-term capital gain of $137,300.31 was realized from the sale of 50,000 shares of stock of Campbell Finance Corporation, Ltd., in lieu of $146,575.24, the amount reported in your return, or a decrease of $9,274.93. The amount of $137,300.31 is computed as follows:

Net sale price, per return	$ 2,126,827.99

Explantion—(Continued)

Basis as determined:		
$2,214,969.94, Canadian converted at $0.9090, exchange rate at date of purchase	$ 2,013,407.68	
Less: Adjustment at date of settlement, $24,000.00, Canadian, converted at $0.995, exchange rate at date of settlement	23,880.00	
Net basis		1,989,527.68
Long-term capital gain, as determined		$ 137,300.31

Computation of Income Tax

Net income adjusted	$ 2,460,592.50
Normal—tax net income	$ 2,460,592.50
Surtax net income	$ 2,460,592.50

Computation under General Rule
(sections 13 and 15, I.R.C.)

Normal tax:		
24% of $2,460,592.50	$ 590,542.20	
Surtax:		
14% of $2,460,592.50	344,482.95	
Total tax under general rule		$ 935,025.15

Computation of Alternative Tax
(section 117(c), I.R.C.)

	Normal-tax Net Income	Surtax Net Income
Income as above	$ 2,460,592.50	$ 2,460,592.50
Less: Excess of net long-term capital gain over net short-term capital loss	381,992.78	381,992.78
Ordinary net income	$ 2,078,599.72	$ 2,078,599.72

Explanation—(Continued)

Normal tax:		
24% of $2,078,599.72	$ 498,863.93	
Surtax:		
14% of $2,078,599.72	291,003.96	
Partial tax		$ 789,867.89
Plus: 25% of $381,992.78		$ 95,498.20
Alternative tax		$ 885,366.09
Less: Credit for income taxes paid to foreign country		153,705.40
Correct income tax liability		$ 731,660.69
Income tax assessed:		
Original, account No. 1-410183		661,069.95
Deficiency of income tax		$ 70,590.74

Received and filed September 15, 1950, T.C.U.S.

Served September 18, 1950.

[Title of Tax Court and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

I. and II.

Admits the allegations contained in paragraphs I and II of the petition.

III.

Admits that the deficiency determined by respondent in the notice of deficiency is in Federal income taxes for the taxable year ended September 30, 1947; but denies the remaining allegations contained in paragraph III of the petition, and all subdivisions thereof.

IV.

(1) to (4), inclusive. Denies the allegations of error contained in subparagraphs (1) to (4), inclusive, of paragraph IV of the petition.

V.

(1) Admits the allegations contained in subparagraph (1) of paragraph V of the petition.

(2) to (5), inclusive. Denies the allegations contained in subparagraphs (2) to (5), inclusive, of paragraph V of the petition.

(6) Admits the allegations contained in the second sentence of subparagraph (6) of paragraph V of the petition; but denies the remaining allegations contained in said subparagraph.

(7) Admits the allegations contained in subparagraph (7) of paragraph V of the petition, except that respondent denies that petitioner realized any taxable gain on the transaction referred to in said subparagraph.

VI.

Denies generally and specifically each and every allegation contained in the petition not hereinabove admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ CHARLES OLIPHANT, E.C.C.
Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel;

E. C. CROUTER,

R. E. MAIDEN, JR.,

Special Attorneys, Bureau of
Internal Revenue.

Received and filed November 13, 1950, T.C.U.S.

[Title of Tax Court and Cause.]

AMENDMENT TO ANSWER

Comes now the Commissioner of Internal Revenue by his attorney, Charles W. Davis, Chief Counsel, Bureau of Internal Revenue, pursuant to permission granted by the Court on the hearing of the above-entitled proceeding at Los Angeles, California, on May 23, 1952, and amends his answer heretofore filed in this proceeding by adding after paragraph VI, and before the Wherefore clause, the following allegation, copied verbatim, as directed by the Court, from the oral motion to amend made

by counsel for respondent, as it was put down in the official transcript. (Tr. 30, 32).

VII.

"* * * that in the event the facts and the law of this case should require the Court to hold that the acquisition of the Campbell stock did not occur until November or December of 1946, then the Respondent erred in treating the sale of the Campbell stock as a long-term capital gain and should have treated it as a short-term capital gain because the Campbell stock was held less than a month before it was sold, and ask for a recomputation of the deficiency upon that basis and a claim for whatever increased deficiency that that might result in."

/s/ CHARLES W. DAVIS,
Chief Counsel, Bureau of Internal Revenue.

Of Counsel:

B. H. NEBLETT,
District Counsel.

E. C. CROUTER,

R. E. MAIDEN, JR.,
Special Attorneys, Bureau of Internal Revenue.

Received and filed June 11, 1952, T. C. U. S.

Served June 12, 1952.

[Title of Tax Court and Cause.]

REPLY TO AMENDMENT TO ANSWER

Comes Now Seaboard Finance Company, petitioner in the above cause by its attorney, and as a reply to the amendment to the answer heretofore filed in this proceeding, admits, alleges, and denies as follows:

VII.

Denies each and every allegation contained in Paragraph VII of respondent's amendment to answer.

Respectfully submitted,

/s/ AUSTIN H. PECK, JR.
Attorney for Petitioner.

Lodged June 19, 1952.

Received and filed June 19, 1952, T.C.U.S.

Served June 20, 1952.

The Tax Court of the United States

Docket No. 30554

[Title of Cause.]

Promulgated May 21, 1953.

FINDINGS OF FACT AND OPINION

Application of Canadian currency which had appreciated in value since original acquisition to consummate purchase of stock in Canada at fixed price

in Canadian dollars held, on facts, not to result in independently realized gain on foreign exchange.

For the Petitioner:

AUSTIN H. PECK, JR., ESQ.

For the Respondent:

R. E. MAIDEN, JR., ESQ.

Respondent determined a deficiency of $70,590.74 in petitioner's income tax liability for the fiscal year ended September 30, 1947. Petitioner has conceded certain adjustments. The sole remaining question is whether petitioner's application of previously acquired Canadian currency, which had appreciated in value since its original acquisition, to consummate the purchase of the capital stock of a Canadian corporation resulted in an independently taxable gain, realized in Canada, apart from any gain realized on the subsequent sale of that stock.

Findings of Fact

Most of the facts have been stipulated and are found accordingly.

Petitioner is a corporation organized under the laws of the State of Delaware. Its principal business office is located in Los Angeles, California. A federal income tax return for the fiscal year ended September 30, 1947, was filed on its behalf on the accrual basis with the collector for the sixth district of California.

Petitioner is engaged in the small loan business. This business consists of making secured and unse-

cured loans, usually to individuals. During the period here in question the average loan made by petitioner was $310.

In 1946 Campbell Finance Corporation Limited, hereinafter called Campbell, was a corporation organized and existing under the laws of the Providence of Ontario, Dominion of Canada. It was then engaged in the small loan business in Canada, operating approximately 50 offices, with aggregate loans outstanding as of March 31, 1946, of approximately $5,965,802 (Canadian).

In January, 1946, Campbell had 50,000 shares of common stock being the only issued and outstanding shares of stock of the corporation. On and immediately prior to January 2, 1946, all of these shares were owned by Industrial Acceptance Corporation, Limited, a Canadian corporation, hereinafter called Industrial.

Industrial's principal business is, and was, except for its ownership of Campbell stock, the discounting of commercial installment paper for Canadian dealers in automobiles, furniture, farm implements, and other property. It was not actively engaged in the small loan business as such except through its ownership of the Campbell stock. Industrial had acquired all of the Campbell stock in 1940, holding it until the end of World War II as a means of compensating for the decrease in its regular business of discounting paper, the latter business having declined during the war period because of shortage of automobiles and other equipment.

In about December, 1945, W. A. Thompson, who was then president of petitioner and who was, at the time of the hearing, the chairman of the board of directors of petitioner, was advised that Industrial desired to sell the 50,000 Campbell shares. In January or February, 1946, Thompson, Paul A. Appleby, who was then vice-president of petitioner, and Frederick N. Towers, petitioner's general counsel, went to Montreal, Canada, to discuss with officials of Industrial a possible acquisition of the Campbell stock.

At that time the officers of Industrial offered to sell the Campbell stock to petitioner for a price equal to the net worth of Campbell, according to its books, plus $1,000,000. In terms of Canadian dollars, Industrial's asking price for the Campbell stock was $2,214,969.94.

Except through utilization of the method ultimately included in the purchase agreement, petitioner did not have sufficient cash resources, either in capital or ability to borrow, to meet Industrial's asking price in cash. Except through utilization of the method ultimately used in the purchase agreement, it could not pay the cash price and still have funds available with which to finance the operations of Campbell. The officers of petitioner discussed a proposal from which emerged the concrete offer made to Industrial on March 27, 1946. On that date petitioner and Industrial entered into a written agreement substantially incorporating petitioner's proposal, and providing in part as follows:

* * *

The provisions of this Agreement * * * were in contemplation of the parties hereto on January 2, 1946, and it is therefore the intention of said parties that this agreement shall be and become effective as of said date.

Seller [Industrial], with all convenient speed following the execution of this agreement, will transfer and deliver to Purchaser [petitioner] 50,000 shares of the authorized, issued and fully paid common stock of Campbell Finance Corporation, Limited, an Ontario Corporation (sometimes hereinafter referred to as "Campbell"), and Purchaser will contemporaneously cause to be lawfully issued to Seller and delivered to the Canadian Bank of Commerce, in escrow, 100,000 shares of its presently authorized common stock.

* * *

Purchaser will proceed with all convenient speed with the preparation and submission to the Securities and Exchange Commission of the United States of a registration statement covering the said 100,000 shares issued by Purchaser to Seller under the terms of this Agreement. Purchaser reserves unto itself the right, in its sole discretion, to register with said Securities and Exchange Commission other and additional of its securities contemporaneously with the registration of the shares so delivered to Seller. Such registration is to be at the sole expense, cost and risk of the Purchaser, and the Seller shall not be held responsible for any act or omission with reference thereto, except to the extent that should any factual data contained in said registration statement

be furnished to Purchaser by Seller, Purchaser may accept the same as being true and accurate in all respects.

Purchaser shall effect appropriate arrangements with investment bankers to be selected by it for the sale to said investment bankers of the shares so issued by Purchaser to Seller, together with such additional shares (if any) as may be required to carry out the undertaking of the Purchaser hereunder, and from the proceeds of such sale Seller shall be entitled to have, receive and retain the sum of $2,214,969.94. If on the sale to said investment bankers of the said 100,000 shares of common stock as above provided, the net proceeds of such sale actually received in cash by the Seller shall not equal or exceed the sum of $2,214,969.94, Purchaser undertakes to make good to the Seller any deficiency in said amount through either or both of the following media, namely:

(a) by issue and delivery to Seller of additional shares of the common stock of Purchaser for sale to said investment bankers as hereinabove already contemplated, with the right to Seller to have and receive the net proceeds of sale thereof to the extent necessary to make good any deficiency as aforesaid; or

(b) to pay to the Seller the amount in cash equal to such deficiency.

The Purchaser further undertakes to indemnify and save harmless the Seller in respect of any and all cost and/or expense to the Seller by way of

transfer taxes and/or otherwise in connection with the transfer and delivery of the 100,000 shares by the Seller to investment bankers for purposes of sale of said shares by the latter as above provided.

In the event of the net proceeds of sale of said 100,000 shares to the investment bankers being in excess of $2,214,969.94, then Seller will instruct and direct said investment bankers to pay over and distribute such excess to Purchaser.

In conformity with the requirements of the Securities Act, 1933, of the United States of America, and the regulations pursuant thereto, Seller and Purchaser agree that the said 100,000 shares of the common stock of Purchaser shall be held by the Canadian Bank of Commerce, in escrow, for the following purposes, namely:

(a) To deliver said 100,000 shares of the common stock of Purchaser to said investment bankers, as hereinabove provided, upon receipt from Purchaser, at any time prior to November 30th, 1946, of a certificate to the effect that a registration statement concerning the said 100,000 shares has been duly filed with the Securities and Exchange Commission of the United States of America and that said registration has become effective, and upon receipt from Seller of written authorization to make such delivery; or

(b) To deliver said 100,000 shares to Purchaser at any time upon receipt of written instructions to that effect from both Seller and Purchaser; or

(c) To deliver said 100,000 shares to Seller at

any time subsequently to November 30th, 1946, upon written instructions to that effect from Seller.

In the event of delivery of said 100,000 shares to Seller as next hereinabove contemplated, Seller covenants that it will not offer the whole or any part of said shares for sale in the United States of America without first complying with all requirements of said Securities Act, 1933.

Pending ultimate receipt by Seller of the sum of $2,214,969.94 as provided in this agreement, Purchaser recognizes that Seller is entitled to reasonable compensation for delayed receipt by Seller of said amount. The parties therefore agree that a proper admeasurement of such compensation shall be interest upon the said $2,214,969.94 from January 2nd, 1946, to date of receipt of said full amount by Seller at the rate of 4½ per centum per annum. Against the amount of such compensation, however, Seller shall credit any and all net proceeds by way of dividends that may be actually received by Seller upon the said 100,000 shares delivered to Seller under the terms hereof.

So long as the said 100,000 shares of the common stock of Purchaser have not been sold to said investment bankers, as hereinbefore contemplated, and provided that Purchaser has not sold or disposed of the whole or any part of said 50,000 shares of Campbell (with the exception of the seven shares thereof required under the terms hereof to be transferred and delivered to the nominees of Seller), then Purchaser may, at any time prior to November 30th, 1946, repurchase the said 100,000 shares from Seller

for and in consideration of the transfer and delivery by Purchaser to Seller of said 50,000 shares of Campbell and the payment to Seller of the sum of $100,000.00 together with a further sum equal to the actual damage, if any, caused to Campbell by reason of any acts of Purchaser. Notice of the intention of Purchaser to repurchase the said shares of the common stock of Purchaser shall be given by registered letter addressed to Seller and delivered to the Executive Offices of Seller in the Sun Life Building, Montreal, at any time up to and including the 30th day of November, 1946. Following said notice Purchaser shall transfer and deliver to Seller said 50,000 shares of Campbell and shall pay to Seller said sum of $100,000.00 at said Executive Offices of Seller not later than twenty (20) days following the date of delivery of said notice, and Seller shall thereupon instruct the Canadian Bank of Commerce to deliver to Purchaser said 100,000 shares of the common stock of Purchaser. The amount of actual damages, if any, caused to Campbell by reason of any acts of Purchaser shall thereafter be ascertained and, if there is no agreement thereon or agreed settlement thereof, the matter shall be submitted to the arbitration of some person to be chosen by Seller and Purchaser, or, if they cannot agree on one person, then to two persons, one to be chosen by Seller and the other by Purchaser, and a third to be appointed by the two persons first chosen, or, on their failing to agree, then by a Judge of the Superior Court for the District of Montreal.

The award shall be conclusive as to the amount of the damage, and shall be payable within fifteen (15) days of the date thereof. If the full amount of the claim for damages is awarded, the costs shall follow the event, and, in other cases, all questions of costs shall be in the discretion of the arbitrators.

If on or before November 30th, 1946, Purchaser has not given notice to Seller of Purchaser's intention to repurchase from Seller the said 100,000 shares of the common stock of Purchaser and Seller shall not have received full payment of the sum of $2,214,969.94 hereinbefore referred to, together with compensation for delay in receipt thereof as herein provided, Purchaser shall thereafter be in default and Seller shall thereupon be entitled to demand and to have and receive from Purchaser any balance still unpaid to Seller of the said sum of $2,214,-969.94, together with compensation for delay in receipt thereof as aforesaid.

To protect and indemnify Seller against any loss that might or could arise or result from Purchaser's election to repurchase its said shares, as above provided, and/or from Purchaser's default as defined in the paragraph next hereinabove, Purchaser agrees to deposit with Seller as cash collateral security concurrently with the transfer and delivery of said 50,000 shares of Campbell as hereinbefore provided, the sum of $2,200,000.00 and Seller agrees that it will credit to the account of Purchaser interest at the rate of 4½ per centum per annum on said amount or any part thereof for the period during which said amount or part thereof so remains

on deposit as cash collateral security with Seller.

Should the proceeds of the sale of said 100,000 shares of the common stock of Purchaser to the investment bankers, as hereinabove provided, be not delivered to Seller, or be insufficient when delivered to Seller to equal or exceed the sum of $2,214,969.94 together with compensation for delay in receipt thereof as herein provided, or should Purchaser notify Seller of Purchaser's intention to repurchase from Seller the said 100,000 shares of the common stock of Purchaser as above provided upon payment to Seller of said sum of $100,000.00 and together with a further sum equal to the damages, if any, as aforesaid, then Seller may, to the extent that any amount due to Seller hereunder has not been paid, take, have and retain from the said sum of $2,200,000.00 so deposited by Purchaser as cash collateral security with Seller an amount sufficient fully to pay to Seller all amounts due to Seller hereunder, and the balance, if any, of said sum so deposited shall thereafter be returned by Seller to Purchaser, with interest as aforesaid. In the event of Seller being in possession or in control of any of the said 100,000 shares or of any proceeds of sale of any thereof after ultimate receipt by Seller of the above-mentioned sum of $2,214,969.94 and compensation for delay in payment thereof, as above provided, then Seller will account to Purchaser in respect of any of said shares or proceeds of sale as aforesaid so still in Seller's possession or under its control.

Pending ultimate receipt by Seller of the said sum of $2,214.969.94, Purchaser covenants and

agrees that it will not sell or otherwise dispose of said 50,000 shares of Campbell and that Purchaser will give to Seller, or to Seller's nominees, a proxy to permit Seller, or said nominees, to vote said common shares of Campbell at all meetings of shareholders of Campbell and that Purchaser will transfer and deliver to nominees of Seller seven (7) shares of Campbell to qualify said nominees to act as directors of Campbell. Seller covenants and agrees that it will procure for Purchaser the resignations of all of said nominees of Seller as directors of Campbell upon receipt of said sum of $2,214,-969.94. Purchaser further covenants and agrees that pending ultimate receipt of said sum there will be no changes in the management of Campbell without the consent of Seller and that the bookkeeping system of Campbell and the fees paid by Campbell to Seller for the use of Seller's bookkeeping machinery shall continue as presently constituted.

* * *

It is specifically understood and agreed by and between the parties to this Agreement that in each and every instance in which the payment, deposit, exchange, adjustment or distribution of money is involved under the terms hereof, such payment, deposit, exchange, adjustment or distribution shall be in Canadian funds in the City of Montreal, excepting only in the event of the sale of shares to the investment bankers, as hereinbefore provided, resulting in an excess over and above the amount to which Seller is entitled, then such excess shall be-

long and shall be payable to Purchaser by the investment bankers in whatever funds or currency such excess may then be.

* * *

Petitioner would have preferred to have made a cash offer for the Campbell stock in an amount substantially less than Industrial's asking price. The acquisition of the Campbell stock by the method set forth in the above contract was necessary in order to meet Industrial's demand that payment of the purchase price be made in cash.

The funds required by petitioner in order to carry on its activities have been d e r i v e d from three sources: (a) equity capital, consisting of preferred and common stock: (b) bonds or debentures; and (c) money borrowed from banks. In 1946 the banks with which petitioner did business limited the total amount of unsecured loans to petitioner at any time to twice petitioner's equity capital, including as equity capital for this purpose all subordinated obligations.

The following table discloses the ratios between petitioner's equity capital, including subordinated obligations, and loans from banks as of the dates indicated:

Date	Superior Indebtedness (Bank Loans)	Equity Capital & Subordinated Obligations	Borrowing Ratio	Ratio had the 100,000 Seaboard shares not been issued to Industrial
Jan. 31, 1946	$10,750,000	$ 7,089,157	1.5-1	
Feb. 28,1946	11,250,000	7,386,673	1.5-1	
Mar. 31, 1946:				
Before execution of contract with Industrial	13,079,366	7,999,228	1.6-1	
After execution of contract with Industrial	17,729,366	9,249,228	1.9-1	2.2-1
June 30, 1946	22,625,000	10,790,427	2.1-1	2.5-1
Dec. 31, 1946				
After sale	21,842,500	12,106,238	1.8-1	2.0-1

Petitioner believed that its common stock would appreciate in value as soon as the public received information that the Campbell stock had been acquired.

During the year 1946, the common stock of petitioner was not listed on any national securities exchange. It was, however, traded in the over-the-counter market. The over-the-counter quotations on the common stock of petitioner on the various dates indicated were as follows:

Date	Bid	Ask
1/ 9/46	14⅝	15⅜
1/15/46	14¼	15
3/ 1/46	13½	14½
3/15/46	13¾	14½
3/26/46	15¾	16½
3/27/46	16¼	17
4/ 2/46	17¼	18
4/15/46	17¾	18½
4/30/46	18½	19½
5/15/46	18½	19¼

Date	Bid	Ask
6/ 3/46	21	22
6/ 7/46	22	23
7/16/46	21½	22½
8/27/46	19¼	20¼
9/ 4/46	17	18
9/ 5/46	16½	17½
9/27/46	16¼	17¼
10/31/46	15½	16½
11/22/46	16¼	17¼

At the time that the negotiations for acquisition of the Campbell stock were being carried on, petitioner had a line of credit with the Bank of the Manhattan Company in the amount of $2,000,000 (United States). Said bank was willing to loan that amount to petitioner for use in connection with the agreement between petitioner and Industrial of March 27, 1946.

On March 27, 1946, petitioner, through its stock transfer agent in New York City, issued, as an original issue, 100,000 shares of its common stock in the name of Industrial, and caused the same to be delivered to the Canadian Bank of Commerce, to be held in escrow. From and after said date of issuance, Industrial appeared on the stock transfer records and on the share register of petitioner as the owner of 100,000 shares of common stock of petitioner.

On January 28, 1946, prior to the issuance of the 100,000 shares of petitioner's stock to Industrial, petitioner's counsel sent a letter to the Securities and Exchange Commission which read, in part, as follows:

* * * The Company [petitioner] is contemplating

an expansion program, divided into two parts * * *

The Company believes it will be enabled to purchase a Canadian finance company on the basis of issuing in payment therefore [sic] certain shares of its common stock on condition that it will guarantee to the seller that it can find a purchaser to distribute the stock to the public within the next seven or eight months. Obviously, under such state of facts, I do not believe the seller, in taking such shares, can be considered to take them for investment but for the purpose eventually of making a public distribution thereof and I think, therefore, registration will be required and have so advised the Seaboard people. The question presented is whether or not there would be a violation of the law if Seaboard were to issue those shares to the seller at this time. In this connection, I have advised Seaboard that, in agreeing to issue the shares, they should insist that the shares be deposited in escrow with a bank, to remain escrowed until such time as a registration statement is in effect, else the shares being in the hands of the seller he might undertake to distribute them irrespective of commitment and before the registration were effected.

The second part of the financing contemplates the sale of shares through an underwriter some time during the summer for the purpose of providing additional capital to Seaboard. Obviously, therefore, it is Seaboard's intention to register both blocks of stock at the same time, thus saving expenses of registration. The seller is not objecting to the fact

the shares he will receive are not now free for sale. He is satisfied to wait the necessary six or seven months, so the real issue involved is the issuance of stock in payment for the property to be purchased plus the undertaking on the part of Seaboard to find a purchaser for that stock and an underwriter to do a public offering, with probably a dollar and cent contingent commitment in the event of non-performance.

* * *

Unless the transaction is handled in the form of the issuance of stock in payment for the property, Seaboard will be required to issue a note or other paper obligation, which must show up on its balance sheet as a quick liability. This would somewhat defeat the purpose of the transaction, whereas the issuance of stock with a contingent liability only to find an underwriter would not adversely affect the Company's balance sheet.

* * *

On February 6, 1946, a member of counsel for the Securities and Exchange Commission, replied to petitioner's counsel in part as follows:

The issuance of stock in connection with the acquisition of the Canadian company and the offering of securities for the purpose of raising additional capital appear to be a part of a general plan for the company's financing. If the shares to be issued to the Canadian company will be accompanied by appropriate restrictions preventing any distribution thereof prior to the effective date of the registration

statement, I should not be inclined to raise any objection to the postponement of registration until such time as the offering to the public will occur. * * *

On March 27, 1946, Industrial caused to be transferred and delivered to petitioner a certificate or certificates evidencing 50,000 shares of the common stock of Campbell. From and after that date, and until petitioner sold the Campbell stock, petitioner appeared on the stock transfer records and the share register of Campbell as the owner of 50,000 shares which constituted all of Campbell's capital stock.

On or about March 30, 1946, petitioner issued its check to the Canadian Bank of Commerce in the amount of two million United States dollars, with instructions to buy $2,200,000 in Canadian dollars for petitioner's account. Canadian dollars in the required amount were purchased for petitioner's account and deposited with Industrial pursuant to their agreement of March 27, 1946. Industrial duly acknowledged receipt of the deposit. The two million United States dollars were borrowed by petitioner from the Bank of the Manhattan Company.

In acknowledging receipt of petitioner's check drawn on the Bank of the Manhattan Company, the letter from the Canadian Bank of Commerce said in part:

We have received [from Industrial] a receipt for $2,200,000 Canadian funds and certificates duly endorsed representing 50,000 shares of common stock of Campbell Finance Corporation, Limited. We record that under the instructions contained in your

letter these certificates are to be held until we receive from you 100,000 shares Seaboard Finance common stock, after which the 50,000 shares of Campbell Finance Corporation stock are to be forwarded to you by registered mail.

* * *

On or about May 4, 1946, petitioner commenced the preparation of a registration statement for filing with the Securities and Exchange Commission in Washington, D. C. This statement was filed on August 29, 1946, and became effective on November 22, 1946. It registered 50,000 shares of series A cumulative preferred stock and 200,000 shares of common stock. The prospectus which was prepared and filed as part of the registration statement stated, in part:

Under the terms of the agreement of purchase and sale, * * *, [petitioner] in payment for all the 50,000 outstanding shares of Common Stock of Campbell, has issued 100,000 shares of its Common Stock, which have been deposited in escrow with the Canadian Bank of Commerce pending the completion of arrangements by * * * [petitioner] with investment bankers for the public sale of said 100,000 shares of Common Stock for the account of Industrial and the registration thereof under the Securities Act of 1933, all of which is to be done by the Company without expense to Industrial. The agreement further provides that Industrial Acceptance Corporation, Limited, shall have no responsibility for any statement made in the Registration Statement, except to the extent that it supplied information

for the Registration Statement. The first 100,000 shares being offered under this Prospectus are the 100,000 shares issued by the * * * [petitioner] to Industrial and are being offered for the account of Industrial Acceptance Corporation, Limited. There is no affiliation between Industrial Acceptance Corporation, Limited, and the * * * [petitioner] * * *.

If the proceeds to Industrial from the sale of the 100,000 shares of Common Stock do not equal or exceed the sum of $2,214,969.94, Canadian funds, the Company must make good the amount of any deficiency * * *.

Under date of November 22, 1946, petitioner and Industrial entered into an underwriting agreement with Van Alstyne, Noel & Co., Johnston, Lemon & Co., and Crowell, Weedon & Co., pertaining to the shares registered as above described. In the first paragraph of that agreement it was stated that petitioner "proposed to issue and sell an aggregate of 100,000 shares of common stock of the par value of $1 each, and the undersigned common stockholder, Industrial Acceptance Corporation, Limited, hereinafter sometimes referred to as the 'Selling Stockholder,' proposed to sell an aggregate of 100,000 shares of outstanding common stock of the par value of $1 each of the Company."

The preparation and filing of the Registration Statement was delayed because of problems encountered in the completion of an audit of Campbell and petitioner.

The delay between the effective date of the Registration Statement and the marketing of Industrial's 100,000 shares of stock of petitioner was attributable to the fact that the underwriters refused to make a public offering of stock in petitioner because of then existing market conditions.

Of the 200,000 shares of common stock registered as above described, 100,000 shares were offered for sale to the public on or about November 22, 1946. These shares were the shares which had been issued by petitioner to Industrial.

The net proceeds, after deduction of underwriting commissions, from the sale of the 100,000 shares of stock in petitioner were $1,440,000. On November 30, 1946, petitioner sent the following letter to Industrial:

November 30, 1946.

Mr. J. P. A. Smyth, President,
Industrial Acceptance Corporation Limited,
Sun Life Building,
Montreal, Canada.

In re: Seaboard Finance Company.

Dear Mr. Smyth:

As per our conversation of today, I hereby confirm the purchase of Campbell Finance Corporation Limited in accordance with the terms of contract dated as of January 2, 1946.

In accordance with the terms of the Underwriting Agreement dated November 22, 1946, between your corporation, our corporation and the underwriters

therein mentioned, we have arranged the sale for your account of 100,000 shares of our common stock issued to you to net you $14.40 per share. We hereby guarantee to you payment of said sum and hold you harmless against any loss in connection with the sale of said stock under the terms of said contract.

For convenience between us and without in any way intending to change the ownership of said shares, we authorize you to charge against the $2,200,000 good faith deposit held by you an amount equal to the proceeds from the sale of this stock provided you will instruct Guaranty Trust Company of New York, to which you will send this stock for delivery to the underwriters, to deposit the proceeds to our account for your credit.

The balance of the purchase price of the Campbell shares you are also authorized to deduct from the deposit fund held by you.

* * *

Petitioner paid dividends to Industrial on account of the 100,000 shares of common stock of petitioner held by Industrial in the total amount of $72,000 (Canadian); and interest, pursuant to the provisions of the agreement of March 27, 1946, in the amount of $21,938.99. During the same period Industrial paid or credited to petitioner interest on $2,200,000 (Canadian) deposited pursuant to the terms of the agreement of March 27, 1946, in the total amount of $69,164.38 (Canadian). The dividends paid to Industrial on the 100,000 shares of petitioner's stock issued under the agreement of

March 27, 1946, were credited against petitioner's interest obligation to Industrial.

On March 27, 1946, and April 1, 1946, the official exchange ratio of the Canadian dollar to the United States dollar was .9090. In November and December, 1946, the official exchange ratio of the Canadian dollar to the United States dollar was par, less one-half of 1 per cent on conversion, or an effective ratio of .995, which had been in effect since July 5, 1946.

In August, 1946, Industrial offered for sale to the public $2,000,000 of its 3½ per cent twenty-year sinking fund debentures series "A," and under date of August 26, 1946, circulated a prospectus relating to that offer. The prospectus contained the following statement relative to Campbell Finance Corporation Limited:

In 1940 when it became evident that the manufacture of automobiles, radios, refrigerators and other durable consumer goods would be curtailed for the duration of the war the Company purchased all of the capital stock of Campbell Finance Corporation Limited (then known as Campbell Auto Finance Company Limited) in order to provide another avenue for the employment of the Company's resources. The business of Campbell Finance Corporation Limited consisted principally of making small loans under the Dominion Small Loans Act of 1939 and operated from its head office in Toronto as well as three branches in the Province of Ontario. Facilities available through the country-wide network of branches of Industrial Acceptance Corpora-

tion Limited made it possible to develop a very substantial and profitable small loans business during the intervening years, thus materially assisting the company to maintain its branch organization and earnings.

With the prospect of the return of instalment sales financing in larger volume than has been enjoyed by the Company in the past, the Directors entered into an agreement with Seaboard Finance Company, one of the larger personal loan companies in the United States, for the sale of all of the shares of Campbell Finance Corporation Limited as at January 2nd, 1946, at a price which gives Industrial Acceptance Corporation Limited a very substantial profit on its investment. As a result of this agreement the Company will withdraw from the small loans field and will have available for its regular instalment sales finance business all of the capital employed in that business before the war, plus the profit realized. The Company has received 100,000 shares of the common stock of Seaboard Finance Company and the latter has undertaken to arrange for the sale of these shares on or before November 30th, 1946, and has guaranteed to Industrial Acceptance Corporation Limited the receipt of $2,214,970. Until November 30th, 1946, Seaboard Finance Company may be relieved of this guarantee by returning the shares of Campbell Finance Corporation Limited and making payment of substantial sums of cash to Industrial Acceptance Corporation Limited. Seaboard Finance Company has deposited with the

Company cash collateral of $2,200,000 to guarantee the fulfillment of its obligations.

Industrial did not want to become, and did not intend to become, a stockholder of petitioner; and petitioner did not want Industrial to become a stockholder.

Petitioner was not a dealer, trader, speculator, or investor in foreign exchange.

Petitioner sold all of its Campbell stock on December 31, 1946.

Petitioner's use of foreign exchange in the purchase of the Campbell stock, in accordance with obligations incurred under the purchase contract of March 27, 1946, did not constitute a transaction in foreign exchange requiring recognition of a taxable gain separate and apart from the subsequent sale of the stock. Respondent properly eliminated the gain on foreign exchange reported by petitioner in its return for the taxable year involved.

OPINION

Opper, Judge.

Although the facts and particularly the details of the arrangement giving rise to the present controversy are complicated and the contentions of the parties cover a wide range of discussion, the central problem seems to us not so involved as might at first appear. Petitioner committed itself to purchase stock of a Canadian corporation which for convenience we call the Campbell stock, guaranteeing to the seller the sum of $2,214,969.94 in Cana-

dian dollars. This amount was to be realized first, out of the sale of 100,000 of petitioner's shares issued to the seller, but to be sold by petitioner, and secondly, from petitioner's agreement to make good to the seller any deficit. As security petitioner was required to deposit in escrow $2,200,000 Canadian, as well as the shares of its stock, pending completion of the details of sale. Petitioner purchased the $2,200,000 Canadian for $2,000,000 United States almost immediately after the execution of the agreement. Some seven months later, after its stock had been marketed for an amount substantially less than the guaranteed price, petitioner authorized the purchaser to apply the deposit to the purchase price.

In the meantime Canadian exchange had risen in value to a point where petitioner claims it realized a gain on the Canadian dollars of the difference, $189,000, between the exchange rate at the time they were purchased and at the time they were turned over to the seller of the Campbell stock. The reason for the peculiar contention by the taxpayer that it has realized a gain contrary to respondent's determination that it has not, is petitioner's position that the gain having taken place in Canada it constitutes the basis for a credit against its United States tax which apparently both parties agree would result in a computation beneficial to petitioner.

We find it unnecessary to pass upon what respondent refers to as his primary argument. It is that the doctrine of such cases as Bernuth Lembcke Co., Inc., 1 B.T.A. 1051, acq. IV-2 C.B. 3, and Joyce-

Koebel Co., 6 B.T.A. 403, acq. VI-2 C.B. 4, is not applicable to isolated or single transactions involving foreign exchange. See American Pad & Textile Co., 16 T. C. 1304. Even if the doctrine of those cases were applicable to these facts, we think petitioner could not succeed.

The basic principle of those cases may be summarized by a quotation from Bernuth Lembcke Co., Inc., supra, 1054;

> * * * The creosote oil could not be inventoried * * * at more than its actual cost and the cost was in terms of the exchange at the date of purchase. * * * [Emphasis added.]

Applying that concept here, the cost of the Campbell stock would be the $2,214,969.94 Canadian converted into United States dollars at the rate of exchange prevailing on the date of purchase, March 27, 1946. As we have said, at approximately the same date and at no different rate of exchange, petitioner purchased $2,200,000 Canadian which it used in connection with the purchase.

The remaining analysis must be stated in terms of hypotheses since both parties deal with the subject in alternatives not necessarily consistent with each other. But on any approach the result is a dilemma from which petitioner cannot escape. If, on the one hand, the Canadian dollars were actually used to pay the purchase price, then no gain or loss on foreign exchange could have resulted[1] in view of the fact that the exchange rate on the date of pur-

[1]There is a difference of $14,969.94 Canadian not accounted for by these transactions. No point is

chase of the Campbell stock and of the Canadian dollars was apparently identical. If on the other hand the use of the Canadian dollars which actually took place was, as petitioner contends, a mere short-cut for a longer operation which would have involved the conversion of the Canadian dollars into American funds and the purchase of Canadian dollars at that time out of the proceeds of the sale of petitioner's stock, then, if we apply the doctrine of Bernuth-Lembcke Co., Inc., supra, any gain on the purchase and sale of the Canadian dollars would be offset by the loss sustained between the purchase price of the Campbell stock converted into dollars at the date of purchase and the amount of American dollars required to purchase the same number of Canadian dollars when payment was subsequently made. See James A. Wheatley, 8 B.T.A. 1246, acq. VIII C.B. 34.

Petitioner attempts, it is true, to escape from this difficulty by the contention "that there is not an inflexible rule of application to these foreign exchange cases. Certainly * * * where petitioner could not determine its cost until certain events occurred it would be error to rule that the cost was determined on March 27, 1946." With deference, this appears to us to be an argument in a circle. We assume that under the principles stated petitioner

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made of this amount, however; the record fails to show in what manner it was discharged or at what point the complicated accounts between petitioner and the seller took it into effect. We accordingly disregard this comparatively small element both for failure of proof and because it appears not to be in controversy.

could and should have determined its cost as of March 27, by the mere process of computing from the fixed amount of $2,214,969.94 Canadian at the then rate of exchange its cost in American dollars. In the end result and regardless of what occurred on the marketing of the stock, those Canadian dollars were required to be paid. If the cases in question are applicable petitioner could have computed its cost. And they therefore cannot be held inapplicable on the ground that petitioner could not compute its cost.

There is a third possibility that on account of the complicated nature of the transaction, it might be contended that petitioner merely borrowed the funds with which the Canadian dollars were secured, and later repaid them; or that petitioner in effect loaned the Canadian dollars to the seller pending the completion of the details of purchase; but in either event no gain or loss would have taken place. North American Mortgage Co., 18 B.T.A. 418; see B. F. Goodrich, 1 T.C. 1098; American Pad & Textile Co., supra.

Viewing the matter practically and eliminating as far as possible the complications of detail, petitioner was in fact no better off or worse off by reason of its transactions in Canadian currency. Whether we deal with the subject as a matter of form or of substance, it accordingly follows that no gain was realized and that the deficiency was correctly determined.

Decision will be entered for the respondent.

Served May 21, 1953.

The Tax Court of the United States
Washington

Docket No. 30554

SEABOARD FINANCE COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion, promulgated May 21, 1953, it is

Ordered and Decided: That there is a deficiency in income tax of $70,590.74 for the fiscal year ended September 30, 1947.

[Seal] /s/ CLARENCE V. OPPER,
Judge.

Entered May 21, 1953.

Served May 22, 1953.

The Tax Court of the United States

Docket No. 30554

SEABOARD FINANCE CO.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PROCEEDINGS

May 23, 1952—10:00 A.M.

(Met pursuant to notice.)

Before: Honorable Clarence V. Opper, Judge.
Appearances:

AUSTIN H. PECK, JR.,
Appearing for the Petitioner.

R. E. MAIDEN, JR.,
(Honorable Charles W. Davis, Chief Counsel, Bureau of Internal Revenue),
Appearing for the Respondent.

* * *

W. A. THOMPSON

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Peck:

Q. Mr. Thompson, please state your name.

A. W. A. Thompson.

(Testimony of W. A. Thompson.)

Q. What is your business address?

A. 945 South Flower Street, Los Angeles 13.

Q. What is your present occupation?

A. Board chairman of the Seaboard Finance Company.

Q. That is the Petitioner in this proceeding?

A. It is.

Q. In 1946, were you an officer of the Petitioner, Seaboard? A. I was president in 1946.

Q. How long have you been engaged either individually or as an officer of the corporation in the small loan business? [40*] A. 29 years.

Mr. Peck: If your Honor please, I should like to present at this time the written stipulation of facts. I present now the original and one copy. The copy does not have attached to it the exhibits.

The Court: The stipulation will be received. Can you tell me the number of the last exhibit?

Mr. Peck: Yes. The last exhibit attached to the stipulation was marked K-11.

The Court: Thank you.

(The document heretofore marked Joint Exhibits Nos. A-1 through K-11 was received in evidence.)

Q. (By Mr. Peck): Mr. Thompson, directing your attention to the year 1946, are you familiar with the transaction between Seaboard and Industrial Acceptance Corporation relating to the stock of the Campbell Finance Corporation?

A. Yes, sir.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of W. A. Thompson.)

Q. Were you at any time advised that the Campbell stock could be acquired? A. I was.

Q. When did you first learn of this?

A. My recollection is that it was in December of 1945.

Q. Did you at that time discuss with anyone in your organization the possible acquisition of that stock? [41]

A. Somewhere about that time, yes.

Q. With whom in your organization did you discuss it?

A. With the officers and directors of the company.

Q. Did you discuss the possible transaction with officials of Industrial Acceptance Corporation?

A. That was sometime in 1946. Three of us went to Montreal, Canada.

Q. Who went on that trip?

A. Paul Appleby.

Q. What was his office?

A. Vice-president of Seaboard. Frederic N. Towers was general counsel. There had been some previous discussions with Industrial by other people with the company, but they were what I would term preliminary.

Q. When you went to Montreal, that was sometime in January of 1946?

A. January or February.

Q. Did Industrial make an offer with Campbell stock to Seaboard? A. They did, sir.

Q. Could you tell us briefly what the terms of their offer were?

(Testimony of W. A. Thompson.)

A. The terms of their offer were balance sheets, net worth plus one million dollars bonus.

Q. Represented in terms of dollars, what would that [42] have amounted to at the time? Was there any set figure?

A. Approximately $2,200,100.00. I might add that I think it is the exact sum that has been used here, the two million two hundred and fourteen and all the rest of it.

Q. That was Industrial's asking price?

A. Yes.

Q. What action, if any, did Seaboard take with respect to that offer?

A. We, at that time, made no counter proposal to them, but inasmuch as we were not in a position to do so, not having the cash resources, either capital or ability to borrow the amount required, we had certain talks with investment bankers regarding raising the amount that would be indicated.

Q. Did the officers of Seaboard discuss at any time any different proposal with Industrial?

A. Not until we finally made a concrete proposal to them sometime in March which finally resulted in a contract dated, I believe, March 27th.

Q. What was the nature of that proposal? Was it substantially the proposal embodied in the final written agreement? A. Substantially, yes.

Q. Now, can you tell us why the proposal embodied in it, which was ultimately embodied in the written, was made by Seaboard in lieu of a cash offer? [43]

(Testimony of W. A. Thompson.)

A. There were several reasons. The chief one was that we didn't have the funds available with which to make the purchase and to finance Campbell, that would become our responsibility. What we would have preferred to have done was to have raised money and made a cash offer which would have been substantially less than were the terms of this agreement, namely, the two million two Canadian. But we saw the possibility of an appreciation in our stock.

Q. You mean Seaboard stock?

A. Yes, marketwise, because public information that we were acquiring or had acquired a company such as Campbell was, would normally be bullish.

Q. Go ahead. Have you anything further to say?

A. Now, if we could sell the stock at a later date at a higher figure than what the stock was currently selling at, we would naturally be acquiring it for less money and thereby reducing this premium, which, in our opinion, was excessive.

Q. When you refer to the premium, you mean the million dollars in excess of stock, do you not?

A. Yes.

Q. Were you familiar with the status of the market for Seaboard stock in 1946? A. Yes.

Q. Do you know what happened to the market for [44] Seaboard stock between, let's say March 1st to the middle of July, 1946?

A. It went up sharply, approximately fifty per cent after public knowledge of the Campbell acquisition. If we had been able to clear the registration

(Testimony of W. A. Thompson.)

statement and sold the stock, we would have had a very nice transaction.

Q. What do you mean when you say "We would have had a very nice transaction"? Will you tell us what you mean?

A. The stock was selling at that time for approximately $14.00. I don't recall the exact figure.

Q. That was in March of 1946?

A. March of 1946, prior to the signing of this contract. In June or July it reached a high of approximately twenty-two dollars and a half. If the 100,000 shares of Seaboard which was owned by Industrial had been sold at that time, that million-dollar premium would have been reduced to a very insignificant sum.

Q. In terms of cost to Seaboard?

A. In terms of cost to Seaboard.

Q. Now, Mr. Thompson, according to the stipulation of facts, Seaboard commenced to prepare a registration statement in May of 1946, but did not file it until August of 1946. Do you know whether or not there was any particular reason for that lapse of time between the commencement of preparation and the actual filing with the Securities & Exchange [45] Commission?

A. The primary reason for the delay was the question of the audit that had to be made of both companies. There was some discussion, as an illustration, as to whether the company of Haskell & Sells would also audit Campbell or whether their previous auditors would make the audit. They

(Testimony of W. A. Thompson.)

would furnish sufficient information to Haskell & Sells, who had to make the over-all certification. It ultimately worked out that the auditors who had previously audited Campbell did their audit under the supervision of Haskell & Sells. The chief reason for that being that it was considered that they could do a faster job of auditing. Campbell had approximately 50 offices and my recollection is that we had approximately 75 offices at that time.

Q. Now, it is further stipulated, Mr. Thompson, that though the registration statement was filed in August of 1946, it did not become effective until November 22, 1946. Was there any reason that you know of for the delay between the filing date and the effective date of the registration statement, and if so, will you state what that reason was?

A. Yes, sir. The reason was that the underwriters refused to make a public offering because the market, the stock market had suffered a severe drop while our statement was in registration. They subsequently agreed to sell the 100,000 shares of Industrial—that Industrial owned of [46] Seaboard, I should say—but refused to sell the additional 100,000 which the company had authorized and had filed a registration for that sale.

Q. Yes. Now, Mr. Thompson, at the time that you initiated your negotiations with Industrial relative to the Campbell Finance Corporation stock, do you know whether or not Industrial was offering the shares to any other prospective purchaser?

A. Yes. They were offering to anyone who was willing to buy or could buy.

Q. Did you have any concern about the timing

(Testimony of W. A. Thompson.)

of any transaction that you might enter into with respect to the Campbell stock?

A. Yes, sir. It was our opinion that unless we could move and move promptly that they would sell it to someone else.

Q. Yes. Now, Mr. Thompson, it is stipulated that on March 27, 1946, the 50,000 shares of Campbell stock was transferred to Seaboard. Do you know whether or not a certificate or certificates actually representing those shares were delivered to Seaboard? A. They were, sir.

Q. Where were they held by Seaboard?

A. In our safe deposit box in the Security First National Bank, except for—well, even the seven shares [47] were transferred to nominees and endorsed back to us.

Q. Now, the agreement which is attached to the stipulation, the agreement between Seaboard and Industrial, required Seaboard to deposit $2,200,000.00 Canadian for the benefit of Industrial. Do you know why that provision was placed in the agreement?

A. Yes, sir. It was to guarantee our faithful performance of the agreement as signed.

Q. Now, did Seaboard have any escape from that ageement, any means of escape?

A. Very definitely.

Q. Will you tell us in substance what it was?

A. We had the agreement stipulated that any time on or before—well, it was so the deal would be closed before the end of the year. I am sorry,

(Testimony of W. A. Thompson.)

but I don't recall the exact date. We could give them notice that we wanted to rescind the contract, in which event, we had certain things to do and they had others, one of them being that we were to give them the 50,000 shares of Campbell stock to receive the 100,000 shares of Seaboard that we had previously given them. They were to receive one hundred thousand Canadian dollars as damages plus any other actual damage that we might have done to Campbell.

Now, the reason for that was this: Frankly, we were not interested in paying two million two for this company. If we [48] couldn't sell our stock at a sufficiently high price on the market, promoted chiefly to the knowledge, the public knowledge that we had acquired, then, we didn't propose to go through with the transaction. Up to some time about the middle of November, we didn't think that we were going through with it. The transaction had been set up in such a manner that we could not be hurt. The question of any damage that might have been done Campbell was taken care of by asking them to put their own men in as members of the board of directors so that the policy of Campbell would be dictated by that board and not by Seaboard, so that there could be no damages arise through any of our actions with Campbell. During the period that that contract was in force, Seaboard borrowed money and lent it to itself. Campbell, at the going rate that Campbell had been paying previously to our acquiring control of it, to at least

(Testimony of W. A. Thompson.)

owning the stock. The difference between what we paid and what we let was in excess of the hundred thousand, damages that we would have to pay if we did not go through with the contract. In November of 1946, we were almost ready to advise Industrial that we were going to call the contract off when we heard that there was a possibility of selling it to the Household Finance Corporation. Naturally, if we could complete our transaction with Industrial and turn right around and sell it to Household for a more attractive figure, that was the business thing to do. [49]

Q. And you did that?

A. And consequently that is what we did. Household later said that they knew that we couldn't go through with it, and consequently, they were proposing to then talk to Industrial, but they had heard a rumor that we were going to sell to Commercial Credit——

Mr. Maiden: Your Honor, I want to confine this testimony here now to competent and admissible testimony. I think Mr. Thompson is getting a little bit into hearsay. I just don't know what import this testimony may have in the case, consequently I want to be sure, Mr. Thompson, that you confine it to your own personal, actual facts without resorting to rumors and hearsay, and things that you learned through devious courses.

Mr. Peck: As a matter of fact, Mr. Thompson, the sale to Household is not directly involved here in this proceeding.

(Testimony of W. A. Thompson.)

The Witness: I see.

Mr. Peck: As far as we are concerned, we don't need to go into that.

That is all the questions that I have, your Honor.

Cross-Examination

By Mr. Maiden:

Q. Mr. Thompson, Industrial had an immediate need for cash money in order to carry on its pre-war type of business. [50] Isn't it for that reason that Industrial put the Campbell stock up for sale?

A. That is not my knowledge, Mr. Maiden.

Q. Isn't it your understanding, and wasn't it your understanding, and isn't it and wasn't it a fact that Industrial before it would enter into this contract with Seaboard, required that Seaboard made available to it two million two hundred thousand cash Canadian dollars at the time of the execution of the agreement?

A. I think I understand your question. Frankly, if I do, I don't know quite how to answer it.

Q. All right. Let me restate the question, then. You stated that the provision in the contract which provided that Seaboard would deposit with Industrial two million two hundred thousand Canadian dollars upon the execution of the agreement was put in there to guarantee the performance of Seaboard under the contract. That is correct, isn't it?

A. Yes, sir.

Q. Now, I will ask you if that provision wasn't actually prompted by the insistence of Industrial

(Testimony of W. A. Thompson.)

that it have at that time available for its use as working capital in its prewar business this amount of money, that is, the $2,200,000.00?

A. That was never so expressed to me, Mr. Maiden. I might say that I was the chief architect of this transaction [51] and was in on the leading discussions.

Q. Who is Mr. A. E. Wademan?

A. A. E. Wademan is at this time the secretary-treasurer of Seaboard Finance Company.

Q. Was Mr. Wademan—am I pronouncing that correctly? A. Wademan.

Q. Was Mr. Wademan with the Seaboard Finance Company at the time of this transaction?

A. I don't believe that he was.

Q. I want to call your attention, Mr. Thompson, to a letter dated November 26, 1949, addressed to the Internal Revenue Agent in Charge, 417 South Hill Street, Los Angeles, California, re Seaboard Finance Company, and assigned and sworn to as you will notice by Mr. A. E. Wademan. You recognize his signature?

A. That is his signature.

Q. That is his signature? A. Yes, sir.

Q. Now, I call your attention to paragraph (7) in this letter on page 29, and I am going to read it to you:

"In order to meet the demands of Industrial, Seaboard deposited cash collateral security of two million two hundred thousand Canadian dollars. This fund was loaned to Industrial and Industrial paid interest for the use of the money. In this

(Testimony of W. A. Thompson.)

fashion, the immediate requirement of Industrial for [52] capital was satisfied and Seaboard was enabled to close the transaction on the only basis possible for it.''

Does that in anywise change or modify your recollection of that?

A. No, not in the least, Mr. Maiden. I was there in Montreal.

Q. It is your testimony now to the court that Industrial did not demand this two million two hundred thousand Canadian because it needed and wanted that cash at that time for use in its business?

A. Well, Mr. Maiden, the reason Jack Smith advanced to me the two million two, was for a deposit to guarantee our good faith. I also know, and if you will look at this financial statement, at that time they were not short of money.

Q. Just a second. Mr. Reporter, will you read my question?

(The question was read.)

The Witness: No. They wanted the two million two as deposit, or what I call good faith money.

Q. (By Mr. Maiden): Mr. Thompson, can you explain why it is that Industrial, if that is all they wanted, some good faith deposit money, would require you to put up all of the ultimate purchase money with the exception of $14,000.00? Doesn't that appear to you to be rather an unusual demand of earnest money, [53] or good faith money?

A. Under the circumstances, I might say that

(Testimony of W. A. Thompson.)

incidentally we tried to make it five hundred thousand or some other lesser figure, but they knew that under the conditions, under our conditions, at that time, that we could not make a cash purchase at that time.

Q. Now, isn't it a fact that Industrial was insisting upon a cash transaction and that they agreed to this method which was adopted of issuing the Seaboard stock and then going through the process of registering it and selling it on the market, wasn't that simply for the purpose of accommodating Seaboard's situation which Industrial was willing to do inasmuch as it was getting in its possession at that time all but $14,000.00 of the ultimate purchase price?

A. That is sort of an involved question. They were willing to enter into this transaction because we were giving them their asking price, knowing that the deal might not be completed by November 30th, but at least it gave them the possibility and they must have felt that it was rather strong, that they ultimately were going to get a closed transaction and get their asking price. That was their inducement.

Q. I still would like to have a comment from you as to whether or not you think that is a reasonable thing to occur, that the seller would require the purchaser to place in the seller's hand practically the entire purchase price [54] simply as earnest money, or good faith money. Don't you think that is an extremely unusual situation?

(Testimony of W. A. Thompson.)

A. Well, if I had been in their shoes, I think I would have done the same thing, if that is what you are driving at.

Q. In other words, so far as Industrial was concerned, Industrial was actually getting all but $14,000.00 of the purchase price in cash at the time of the execution of the agreement; isn't that correct?

A. No, sir, I don't think so. I will agree with you that they had the use of the two million two for that period of time, but they did not have a closed transaction at that time.

Q. I want to read to you paragraph (1) from this same letter that I just read you:

"Industrial at the conclusion of the war was anxious to return to its regular business, the financing of installment sale obligations. It had engaged in the small loan business through Campbell only as a wartime stopgap. If it was to return successfully to the desired activity, it needed to dispose of Campbell so as to obtain additional working capital."

Is that your understanding?

A. That is my understanding exactly except as to time. Otherwise, it is a true statement. Now, if this infers that they needed the money, that is not correct now; as to the future, yes. [55]

Q. Mr. Thompson, can you explain why if Industrial need any money that it would take $2,200,000.00 and pay interest on it at four and a half per cent? Can you explain that?

(Testimony of W. A. Thompson.)

A. Possibly the answer to that is this: In the first place, the going rate for money in Canada at that time was approximately four and a half per cent. That was number one. Number two, they were to get dividends or interest to equal four and a half per cent on the stock which they were taking with the potential value of two million two. So it was the standoff——

Q. What potential value are you talking about? Industrial got two million two hundred thousand cash dollars. What concern did they have with respect to the value of that 100,000 shares of Seaboard stock?

A. Their ultimate source of money was the sale of 100,000 shares of Seaboard stock and they received dividends, and if the dividends were not adequate to equalize four and a half per cent, equal four and a half per cent, we were to make up the difference.

Q. Well, the four and a half per cent that Industrial was to pay on this $2,200,000.00 was to be offset to whatever extent it received a dividend on the Seaboard stock that had been named in the name of Industrial, isn't that right?

A. No. I may have misunderstood you. If I understood [56] you correctly, the interest that they were to pay us on the deposit was to be offset by any dividend that they received. That is not my recollection, if that was your question.

Q. Well, the contract, of course, will speak for itself. I have it right here before me. Well, I will

(Testimony of W. A. Thompson.)

just let it speak for itself. I don't have it before me. I thought I did, but I don't.

Now, you would assume, would you not, Mr. Thompson, that a company that would take $2,200,000.00 at four and a half per cent interest and that represented the going rate of interest what they would have had to borrow from any other source, that the company, if they needed that money, wouldn't take it? A. Yes, sir.

Q. It is also true, isn't it, that it was quite a large indemnity that Seaboard would have to pay in the event this transaction fell through, wasn't it?

A. $100,000.00.

Q. $100,000.00. Wouldn't you call that a pretty fair security? A. What?

Q. $100,000.00 to evidence a good faith on the part of the proposed purchaser that he will buy the stock.

A. I am sorry, but I don't understand that.

Q. All right. The contract provides that if Seaboard [57] doesn't go through with this transaction that they will pay you $100,000.00?

A. Right.

Q. In addition to other considerations depending upon whatever damage might have been done to Campbell, wouldn't you say that that indemnity would be a rather substantial indemnity?

A. We tried to get it down to twenty-five thousand.

Q. That doesn't answer my question. Wouldn't you say that that was a very substantial indemnity?

(Testimony of W. A. Thompson.)

A. I don't see how I could say that, Mr. Maiden. When we did agree to it, we must have thought it was reasonable at that time.

Q. Either you thought it was reasonable at that time or you knew, of course, that you were going to go through with the transaction. Isn't that right, Mr. Thompson? A. We certainly hoped that.

Q. You actually did go through with it, did you not? A. Partly.

Q. You haven't presented anything in writing here to show that you have contemplated actually not going through with it, have you?

A. The contract, I think, intimates that we may not go through with it.

Q. That is true. The contract does furnish an out. [58]

Now, suppose you had been Industrial. You sell some of your stock under such an agreement as this for $250,000.00 and the purchaser turns over to you $249,000.00 of the purchase price at that time. So far as you were concerned, the effect would be for you to get the purchase price in cash at that time for all practical purposes, wouldn't that be the fact, Mr. Thompson?

A. Well, I certainly would have the use of the money, but there is a string on it and it can be jerked out from under me. In other words, it is not a closed transaction.

Q. Now, Mr. Thompson, it certainly was the intention of Seaboard and the understanding, of course, of Industrial that in the event nothing hap-

(Testimony of W. A. Thompson.)
pened to cause the contract to break down and not go through, that the $2,200,000.00 would to that extent represent the purchase price paid for the stock at the time the balance was struck between the parties. Isn't that correct?

A. I am sorry, but I am back of you here a couple of miles. I didn't follow that.

Q. Mr. Reporter, will you read that if you can? Read it very slowly so that Mr. Thompson can analyze it as it goes along.

(The question was read.)

The Witness: No, sir. [59]

Q. (By Mr. Maiden): You mean that is not correct, Mr. Thompson?

A. That is not correct, Mr. Maiden.

Q. In other words, you mean to represent here to this court that Seaboard did not intend that that $2,200,000.00 would be used as application on the purchase price when this contract was finally wound up?

A. Yes, sir. That was a deposit. Now, if you would like me to, I will explain the reason.

Q. Just a second. I don't understand. Do you mean to tell the Court here under oath that Seaboard did not intend that that $2,200,000.00 be actually used and applied to the purchase price of that Seaboard stock? A. Absolutely.

Q. Do you mean to tell the Court that Seaboard intended to have Industrial take those two million two hundred thousand Canadian dollars and change them into American dollars and turn them over to

(Testimony of W. A. Thompson.)

Seaboard, and then that Seaboard would take enough American money to equal the purchase price and then buy Canadian dollars and turn them over to Industrial?

A. Well, now, if you are talking about switching money back and forth, that is one thing; if you are talking about whether Industrial would get the proceeds from the sale of the stock as such, or whether they would get the two million two deposit, that is something entirely different. [60]

Q. Well, the point——

A. At least to me.

Q. The point that I am making is that you knew at the time that you entered into this contract with Industrial, and Industrial knew it, that the two million two hundred thousand Canadian dollars that it had on hand would actually be kept by them and that whatever proceeds of the 100,000 shares of Seaboard stock brought, that Seaboard would take that money. Now, isn't that a fact?

A. Well, that is sort of an involved question to me. I would like to explain to you in this way; Industrial was to get the proceeds from the sale of this common stock.

Q. Now, you are talking about the form of the contract. I want to talk about the actualities of the situation, not just the form of the contract. I am not interested in that. I want to know whether or not as an actual fact it wasn't the intention and understanding of the parties that that two million two hundred thousand cash dollars would be taken,

(Testimony of W. A. Thompson.)

kept and utilized as application of the purchase price in the event the contract didn't fall through.

A. There was no such agreement as that, if I understand your question correctly, and I believe I did.

Q. You think you do? That never entered your mind at all?

A. No, that was not part of the discussion, that I know. [61]

Q. In other words, you say that you intended to go through the exchange and later on actually take that two million two hundred thousand Canadian dollars away from them and then buying some more Canadian dollars and replace it with a later purchase of Canadian dollars?

A. The little mechanics of the things were not gone into at that time, Mr. Maiden.

Q. Well, now, looking at it from a realistic standpoint—just step back now in a purely objective manner—wouldn't it appear to you to be the reality of this situation, that the two million two hundred thousand Canadian would be used to that extent as the purchase price of the Campbell stock in the event that the contract went through, and that whatever right and claim that Industrial had on the proceeds from the sale of the Seaboard stock would be released to Seaboard?

A. I see what you are driving at. Sure, Industrial controls, just to us, the figure of two millions in America obtained from the sale of stock and controls two millions in Canada which has to

(Testimony of W. A. Thompson.)

be returned to us. I certainly would think that they would pay us with the American money rather than convert the American money into Canadian money for their own account and convert the Canadian money which they had to give back to us. They could return us Canadian and we switch [62] it back, but the proceeds of the sale of the stock was their money and not ours. It was their stock.

Q. Well, at least Seaboard and Industrial went through the form of issuing a 100,000 shares of Seaboard stock in the name of Industrial and it stated in the contract that it was Industrial stock.

A. That is right.

Q. Now, isn't it a fact that in this case Industrial wasn't interested in becoming a stockholder of Seaboard? Isn't that right?

A. I think that is right, and we didn't want to see them either too much.

Q. Industrial was wanting cash money?

A. Yes.

Mr. Maiden: All right. I believe that is all.

Mr. Peck: I have no further questions.

The Court: Is there anything further for the Petitioner?

Mr. Peck: Nothing further, your Honor.

Mr. Maiden: Nothing further, your Honor.

* * *

Filed June 15, 1952 [63]

In the United States Court of Appeals
for the Ninth Circuit

Tax Court Docket
No. 30554

Court of Appeals

Docket No.....

SEABOARD FINANCE COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REVIEW OF DECISION OF THE TAX COURT OF THE UNITED STATES

To the Honorable Judges of the United States Court of Appeals for the Ninth Circuit.

Seaboard Finance Company hereby petitions this Court to review the decision of The Tax Court of the United States entered May 21, 1953. Petitioner respectfully represents:

I.

Jurisdiction

This petition is filed pursuant to Sections 1141 and 1142 of the Internal Revenue Code, 26 U.S. C.A., Secs. 1141 and 1142.

II.

Nature of Controversy

The case involves Federal income tax liability of the petitioner for its taxable year ended September 30, 1947.

The deficiency determined by respondent and affirmed by the The Tax Court results from a reduction by respondent in the amount of credit claimed by petitioner under Sec. 131 of the Internal Revenue Code for income taxes paid to Canada. The credit claimed by petitioner was $230,580.91. The amount allowed by respondent and The Tax Court was $153,705.40.

The amount of the credit depends upon the amount of income realized by petitioner from sources within the Dominion of Canada during the year involved, and this, in turn, depends upon whether petitioner realized a gain of $189,000.00 in December, 1946, by reason of the application of Canadian dollars, which had appreciated in value between the date of their purchase and their said application, to the purchase of 50,000 shares of stock in Campbell Finance Corporation, Limited, a Canadian corporation. Petitioner contends that such a gain was realized, whereas respondent contends and The Tax Court determined that no such gain was realized.

III.

Venue

Petitioner filed its Federal income tax return for the taxable year ended September 30, 1947, with the

collector of Internal Revenue for the Sixth District of California. Accordingly, petitioner seeks a review of said decision of The Tax Court of the United States by the United States Court of Appeals for the Ninth Circuit.

Wherefore, your petitioner prays that this Court review said decision of The Tax Court of the United States, reverse the same, and issue such order or orders as may be proper in the premises.

Dated: August 21, 1953.

Respectfully submitted,

/s/ AUSTIN H. PECK, JR.,

/s/ HENRY C. DIEHL,

Attorneys for Petitioner.

Of Counsel:

LATHAM & WATKINS.

Received and filed August 21, 1953.

[Title of Court of Appeals and Cause.]

NOTICE OF FILING OF PETITION FOR REVIEW OF DECISION OF THE TAX COURT OF THE UNITED STATES

To the Commissioner of Internal Revenue, Washington, D. C.:

You are hereby notified that petitioner in the above-entitled proceeding in The Tax Court of the United States has filed, concurrently herewith, its petition to the United States Court of Appeals for the Ninth Circuit for review of the decision of The

Tax Court in said proceeding. A copy of said petition for review, together with this notice, are hereby served on you..

Dated: August 21, 1953.

/s/ AUSTIN H. PECK, JR.,
/s/ HENRY C. DIEHL,
Attorneys for Petitioner.

Of Counsel:
LATHAM & WATKINS.

Acknowledgment of Service

Service of the above Notice of Filing of Petition for Review, together with a copy of said Petition for Review, is hereby acknowledged this 21st day of August, 1953.

/s/ [Indistinguishable.]
Acting Chief Counsel, Internal Revenue Service,
Counsel for Respondent.

Received and filed August 21, 1953, T.C.U.S.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Victor S. Mersch, Clerk of The Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 15, inclusive, constitute and are all of the original papers and proceedings on file in my office as called for by the "Designation as to Contents of Record on Review and Statement of Points" and the "Counter Designation of

Contents of Record on Review" in the proceeding before The Tax Court of The United States entitled "Seaboard Finance Company, Petitioner, v. Commissioner of Internal Revenue, Respondent, Docket No. 30554" and in which the petitioner in The Tax Court proceeding has initiated an appeal as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceeding, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 13th day of October, 1953.

[Seal] /s/ VICTOR S. MERSCH,
Clerk, The Tax Court of the United States.

[Endorsed]: No. 14,095. United States Court of Appeals for the Ninth Circuit. Seaboard Finance Company, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed October 23, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
Docket No. 14,095

SEABOARD FINANCE COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STATEMENT OF POINTS ON WHICH PETITIONER INTENDS TO RELY

(1) The Tax Court erred in entering decision for the respondent.

(2) The Tax Court erred in not entering decision for petitioner.

(3) The Tax Court erred in its finding that petitioner's use of foreign exchange in the purchase of the stock of Campbell Finance Corporation, Ltd., in accordance with the obligations incurred under the contract of March 27, 1946, did not constitute a transaction in foreign exchange requiring recognition of a taxable gain separate and apart from the subsequent sale of the Campbell Finance Corporation, Ltd., stock.

(4) The Tax Court erred in its conclusion that the respondent properly eliminated the gain on foreign exchange reported by petitioner in its return for the taxable year involved.

(5) The Tax Court erred in its finding that the 100,000 shares of capital stock of petitioner issued to Industrial Acceptance Corporation, Ltd., were deposited as security.

(6) The Tax Court erred in its conclusion that the cost to petitioner of the 50,000 shares of stock of Campbell Finance Corporation, Ltd., was $2,214,-969.94 (Canadian), converted into United States dollars at the rate of exchange prevailing on March 27, 1946.

(7) The Tax Court erred in its conclusion that any gain on the purchase and sale of Canadian dollars in this proceeding was offset by a loss sustained between the purchase price of the stock of Campbell Finance Corporation, Ltd., converted into dollars at the date of purchase, and the amount of American dollars required to purchase the same number of Canadian dollars when payment was subsequently made.

(8) The Tax Court erred in its conclusion that petitioner could and should have determined its cost of the Campbell Finance Corporation, Ltd., stock as of March 27, 1946.

Dated: October 29, 1953.

Respectfully submitted,
/s/ DANA LATHAM,
/s/ AUTIN H. PECK, JR.,
/s/ HENRY C. DIEHL,
Attorneys for Petitioner.

Affidavit of service by mail attached.

[Endorsed]: Filed October 30, 1953.